U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 04 December 2003

CASE NO.: 2003-WPC-00004

IN THE MATTER OF

DENIS VAMVORAS,
Complainant

v.

KAKIVIK ASSET MANAGEMENT and
ALYESKA PIPELINE SERVICES COMPANY,
Respondents

APPEARANCES:

DENIS VAMVORAS
Pro se Complainant

PERRY GROVER, ESQ.
On behalf of Respondent Kakivik

CHARLES FLYNN, ESQ.
On behalf of Respondent Alyeska

BEFORE: LARRY W. PRICE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
(Denying Complaint)

This case arises under the employee protection provisions of Section 507 of the Federal Water Pollution Control Act of 1972, codified at 33 U.S.C. § 1367 (herein the WPCA), Section 23 of the Toxic Substances Control Act of 1976 (TSCA), codified at 15 U.S.C. § 2622, Section 322 of the Clean Air Act (CAA), codified at 42 U.S.C. § 7622, and Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA), codified at 42

U.S.C. § 6971, and the implementing regulations hereunder at 29 C.F.R. Part 24. Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part and specifically prevent employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes.

On August 8, 2002, Denis Vamvoras (Complainant) filed an administrative complaint against Alyeska Pipeline Services Company (Respondent Alyeska) and Kakivik Asset Management (Respondent Kakivik) with the United States Department of Labor Office of Safety and Health Administration (OSHA) complaining of various alleged violations of the WPC, TSCA, CAA and SWDA, including his July 5, 2002 termination. On January 23, 2003, OSHA advised Complainant that the preponderance of the evidence did not support his allegations of discrimination and that there was no evidence that either Respondent violated the employee protection provision of the various environmental acts in question. Complainant's complaint was dismissed. On February 7, 2003, Complainant filed an appeal and request for hearing.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, on February 19, 2003, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing for May 19, 2003, in Metairie, Louisiana. On April 23, 2003, Respondents filed a motion requesting a change in hearing location from Metairie, Louisiana, to Anchorage, Alaska. On April 30, 2003, the Court issued an order granting the motion to change location and a notice rescheduling the hearing for July 21, 2003, in Anchorage, Alaska. The hearing commenced on July 21, 2003, and closed on July 24, 2003. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs. The following exhibits were received into evidence:[1]

1. Complainant's Exhibit Numbers 1-5 and 7-22 and
2. Respondents' Exhibit Numbers 1-19.

Post-hearing briefs were received from Respondents on September 29, 2003. Complainant's post-hearing brief was received on November 19, 2003. Reply briefs were received from Respondents on December 1, 2003.

ISSUES

The unresolved issues in this proceeding are:

[1] References to the record are as follows: Transcript: Tr.; Complainant's Exhibits: CX.; Respondents' Exhibits: RX.

1. Whether jurisdiction exists under the environmental acts pursuant to which Complainant's allegations were made;

2. Whether Complainant's claim against Respondents was timely filed;

3. Whether Respondent Alyeska was Complainant's employer for purposes of the environmental acts in question; and

4. Whether Respondent(s) took adverse employment action against Complainant due to his protected activity as an electrical inspector.

STATEMENT OF THE CASE

In late 2001, Respondent Kakivik Asset Management was awarded a contract to provide inspection services on a Trans-Alaska Pipeline project for Respondent Alyeska Pipeline Services Company. Complainant, who had worked for AII, a company which also provided inspection services to Alyeska before losing the contract, applied for a job as an electrical inspector with Kakivik for the 2002 season. In late December 2001 and early January 2002, Kakivik hired two electrical inspectors in Fairbanks, Alaska, and one electrical inspector in Valdez, Alaska. At the time, Complainant believed that he was not chosen as an electrical inspector because he had written numerous reports on non-conforming conditions when he worked for AII.

In April 2002, Complainant signed an at-will contract to work as an electrical inspector for Kakivik at the Valdez Marine Terminal. After four days of work, however, Kakivik laid Complainant off for lack of work. Complainant returned home to Louisiana, and in July 2002, Kakivik terminated his employment.

Complainant alleges that Kakivik initially failed to hire him and then later laid him off and terminated his employment in violation of the relevant federal environmental whistleblower statutes. Complainant believes that because of his whistleblower status, Kakivik and Alyeska viewed him as a troublemaker and did not want to hire him. Respondents argue that all employment decisions related to Complainant were made for legitimate, non-discriminatory reasons. Respondents contend that Complainant was not hired in January 2002 because the other electrical inspectors were already in the Alaska area at that time, while Complainant was not. Respondents allege that when Complainant was hired at Valdez in April 2002, Kakivik was unaware that the schedule had slipped on the project Complainant was hired to do. Respondents claim that Kakivik hoped to bring Complainant back later in the year, but there was simply not enough work available to justify the expense of hiring another electrical inspector. Respondents argue that Complainant was terminated for lack of work and no other reason.

FINDINGS OF FACT

Based upon the hearing testimony, supporting evidence and briefs of the parties, I make the following findings of fact:

1. Kakivik Asset Management (Kakivik) was formed in 1990 for the purpose of doing nondestructive testing work, mostly on oil-related facilities. (Tr. 34-35). In 2001, Kakivik bid on its first actual nondestructive testing-related inspection project with Alyeska Pipeline Services Company. (Tr. 35). Kakivik received the bid award on December 13, 2001. (Tr. 444). Before receiving the bid, Kakivik had never done inspection work on the Trans-Alaska Pipeline, which runs about 800 miles across Alaska, from the North Slope of Alaska to the Valdez Marine Terminal in Prince William Sound. (Tr. 35, 42). There was a time period of about fifteen days between the day when Kakivik was awarded the contract and the day when the contract was to begin. During that time, Kakivik was looking for welding, civil, mechanical, coding, nondestructive testing and electrical inspectors. (Tr. 35).

2. Alyeska Pipeline Services Company (Alyeska) is a consortium owed by the pipeline companies which are affiliated with the owners of the oil on the North Slope of Alaska. (Tr. 42). Alyeska operates the Trans-Alaska Pipeline, which is regulated by a federal and state organization called the Joint Pipeline Office. (Tr. 42-43).

3. As per the contract with Alyeska, Kakivik made the assignments for work locations, and Alyeska did not have control over this process. Kakivik had control over the hiring and laying off process. (Tr. 531). Kakivik negotiated wages, hours and benefits and also controlled the discipline process. (Tr. 531-32). Kakivik paid employee wages and withholding taxes, while Alyeska reimbursed Kakivik for the wages. (Tr. 532). Alyeska established the inspection criteria which the Kakivik inspectors were to follow as guidelines in performing their tasks. (Tr. 532-33). Kakivik had an internal employee concern program (ECP) and also used Alyeska's ECP in conjunction with its own. (Tr. 547). If a Kakivik employee filed an ECP with Alyeska, Kakivik would not be notified unless there was a formal investigation involved. (Tr. 548).

4. Both Respondents agree that Complainant engaged in protected activity and that Complainant suffered adverse action in the form of a layoff and later termination of his employment. (Tr. 53).

5. Complainant first began working in Alaska in 1986. (Tr. 110). Throughout the 1990s, Complainant worked as an inspector and as a superintendent for various companies in Alaska, moving from job to job. (Tr. 111-15).

6. While working for various companies who contracted with Alyeska, Complainant took his job as an electrical inspector very seriously, and he felt that this attention to detail created problems for him in the workplace. In one instance in 1999, Complainant wrote over thirty-two non-conforming reports (NCRs) for a crane inspection project and later learned that no NCRs had been written on this area for the previous five years. (Tr. 120). He felt that some of the other employees questioned the amount of NCRs he wrote and thought that he was making up violations. (Tr. 122). Complainant testified that many people were unwilling to write NCRs for fear of losing their jobs. (Tr. 123).

7. In 1999-2000 Complainant was employed by Houston Nana, a contractor for Alyeska,[2] when he was selected as the inspector for the berth project. (Tr. 136, 138). Complainant began having concerns about the incompleteness of the cable tray system, and he alleged that Houston Nana and Alyeska wanted him to ignore the code and the manufacturer's instructions when installing the cable. (Tr. 136-38). Complainant wrote some NCRs regarding his concerns about the installation. (Tr. 141).

8. Complainant acknowledged that it was a legitimate point of view to not write additional NCRs if there was already an NCR covering a particular situation. (Tr. 234).

9. In March 2000, Complainant began working as an electrical inspector for ASCG/AII, a sub-contractor for Alyeska. (Tr. 115-16, 129). Complainant's primary place of employment in 2000-2001 was the Valdez Marine Terminal. (Tr. 276-77). He was not assigned to the Fairbanks group, although he preferred to work out of Fairbanks. (Tr. 130, 276-77). Complainant testified that he identified numerous NCR conditions but was told by the inspector coordinator, as well as other persons, not to write NCRs. (Tr. 132-33, 136-37, 140-41).

10. Don Verble is a state electrical inspector with the Alaska Department of Labor. (Tr. 326-27). Mr. Verble works with the Joint Pipeline Office

[2] I note that, while largely irrelevant to the issues in question, there is some discrepancy in Complainant's testimony as to the identity of his employer at the time of this incident—namely, although Complainant testified that he was working for Houston Nana when the cable tray system installation issue arose, he later stated that he was working for AII at the time. (Tr. 140). At any rate, it is unclear just which contractor Complainant was working for at the time.

(JPO), which is a conglomerate of state and federal agencies that ensures that the grant and lease issued to Alyeska is followed on the Alyeska Pipeline. Mr. Verble has jurisdiction over all new construction and modification of any facilities up and down the line and is also assigned to examine any OSHA problems that arise. (Tr. 327). Mr. Verble considered NCRs a helpful tool that enabled him to ensure that code violations were being addressed. (Tr. 329). Complainant sought guidance from Mr. Verble regarding how to interpret the code and enforce its requirements. (Tr. 332). Although Mr. Verble noted that Complainant's judgments were not always in accord with what the company wanted, in general Complainant did "the job . . . [he] was hired to do." (Tr. 333).

11. Gerry Smith met Complainant in 1999, when both men worked for AII. (Tr. 57). Mr. Smith, who was an inspector at the time, did not encounter any problems at work based upon the number of NCRs that he wrote. (Tr. 62, 67). When Mr. Smith later worked as Complainant's supervisor, he found Complainant to be a very thorough and conscientious employee. (Tr. 77-78). Mr. Smith never knew Complainant to disregard or ignore the direction of a supervisor. (Tr. 640). Mr. Smith felt that writing NCRs was a beneficial practice and he did not feel that there was any pressure on the inspectors to avoid writing NCRs in 2000-2001. (Tr. 86-87, 95-96).

12. Bryce Kale is a mechanical and welding inspector who worked at Valdez Marine Terminal in the 2001 and 2002 seasons. (Tr. 289). He worked for AII on a berth project with Complainant during the 2001 season, working from mid-May 2001 until he was laid off around November 20, 2001. (Tr. 289-90, 293). According to Mr. Kale, the other employees did not like having the inspectors write NCRs because the NCRs cost Alyeska money. (Tr. 290-91, 322-23).

13. In 2001, Earl Hall was the inspection team lead for Alyeska at the Valdez Marine Terminal. (Tr. 726-728). His duties included overseeing the inspection contracts and ensuring that inspections were done in a timely and satisfactory manner. (Tr. 728). At that time, Complainant worked with the inspector contractor performing electrical inspection duties for Alyeska. (Tr. 729). In the course of their working together, Complainant asked Mr. Hall about the Alyeska contract situation, and Mr. Hall told Complainant that he would probably be rolled over with the new contractor. (Tr. 143-44).

14. While working together, Mr. Hall and Complainant did have disagreements, but Mr. Hall felt that Complainant did a very good job with his inspection duties and never had any concerns about the quality of

Complainant's work. (Tr. 729-30). For his part, Complainant acknowledged that Mr. Hall had supported his position in the multiple NCRs situation. (Tr. 236-37). The disagreements between Mr. Hall and Complainant had nothing to do with Complainant's job performance. Mr. Hall recalled that Complainant was displeased with a decision that Alyeska made about internet use in the office. (Tr. 731). After Complainant filed an ECP complaining that Mr. Hall's restriction of the employees' internet use was a violation of Alyeska's open work environment policy, Complainant felt that his relationship with Mr. Hall changed, even though they formerly had gotten along well. (Tr. 144-46). For his part, Mr. Hall felt bad that Complainant was so upset about the internet use decision. (Tr. 731-32).

15. According to Mr. Smith, Mr. Hall gave him instructions as to which personnel were wanted and not wanted on a job. Although Mr. Hall never mentioned Complainant by name when talking about people not to hire, Mr. Smith felt that it was obvious that Mr. Hall was referring to Complainant and another employee, both of whom were very vocal during the dispute over internet use in the workplace. (Tr. 99-100, 641, 649). Mr. Smith did not recall whether other inspectors ever came to him on the job and requested that he tell Complainant to stop being disruptive on the job. (Tr. 646).

16. Paul Casey is employed by Kakivik as a general inspector at the Valdez Marine Terminal. (Tr. 588-89). He formerly worked for AII in the same capacity. (Tr. 590). At some point while Mr. Casey and Complainant were both employed by AII, Complainant came into Mr. Casey's office and gave him a copy of a pamphlet entitled "Alaska Whistleblower Resource Guide," dated September 1997. (Tr. 592-93). In working with Complainant, Mr. Casey found Complainant to be a distraction because he often "ranted and raved" to the other inspectors about the situation at Alyeska as well as complaining about other subjects, such as politics. (Tr. 595-97). Mr. Casey never heard that Complainant was a bad electrical inspector. (Tr. 600).

17. In March 2001, James Luchini was hired by Alyeska on an eighteen month term contract as the Area Projects Manager in Valdez, where he worked until he was transferred to another position on August 31, 2002. (Tr. 345-46). In 2001, Mr. Luchini's goal was to improve overall efficiency in project implementation, particularly with regard to schedule, quality and cost performance issues. (Tr. 348-49). According to Mr. Luchini, inspection services played a critical role in ensuring that projects were completed correctly the first time. (Tr. 350). Mr. Luchini instructed people

that if an inspector wrote an NCR on a condition, the inspector should be thanked and the non-conforming condition should be resolved accordingly. (Tr. 385).

18. When Alyeska had a negative earn value for the 2001 season, Mr. Luchini orchestrated a demobilization of the primary implementation contractor during the first week of November 2001 to focus on cost containment. Mr. Luchini requested that in 2002, all the contractors focus on the workload in Valdez as one large project, rather than many small projects. (Tr. 355). Mr. Luchini also wanted the contractors to focus on staffing. (Tr. 356).

19. In December 2001, AII lost its inspection contract with Alyeska. (Tr. 143).

20. Mark Brady is the inspector coordinator for Kakivik's Fairbanks unit. (Tr. 400-01). Mr. Brady formerly worked for AII, and when AII lost the contract with Alyeska, Mr. Brady inherited the inspector coordinator job and was hired by Kakivik after the previous coordinator left. (Tr. 405). During the Christmas holidays, there was electrical inspection work ongoing, and Kakivik hired Ralph Jordan as the inspector because Mr. Jordan typically was available to work during the December holidays, while most other employees took time off to be with their families. (Tr. 408-09).

21. Mr. Brady testified that he never heard anyone from Kakivik or Alyeska say that Complainant should not be hired for the Fairbanks unit. (Tr. 410-11). Mr. Brady was unaware of anyone at Alyeska raising concerns about the number of NCRs that Complainant wrote during his inspections. (Tr. 415). He explained that if there is already a known problem on a job, there is no need to write another NCR documenting that problem. (Tr. 420). Mr. Brady denied that Alyeska ignored NCRs. (Tr. 421).

22. Thomas Redmond is the human resources manager for Kakivik. His duties include overseeing the hiring and termination process. (Tr. 442). On December 13, 2001, Kakivik was awarded a contract with Alyeska, and Mr. Redmond received a "flood" of phone calls and resumes from employees who had worked for the previous contractor on the project. It was a very hectic time period between December 13, 2001, the day that Kakivik got the contract, and January 1, 2002, the day that the contract work was to start. (Tr. 444). At that time, Mr. Redmond did not yet know what personnel were needed in certain locations. (Tr. 446).

23. On December 17, 2001, soon after Kakivik was awarded the contract with Alyeska, Complainant submitted his resume to Kakivik. (Tr. 156, 445).

Complainant felt fairly certain that he would be hired by Kakivik. (Tr. 158). Complainant knew that in 2002, there would be one less inspector at the Valdez Marine Terminal. (Tr. 265). He did not know the situation with electrical inspectors in Fairbanks and was unaware that there would also be fewer electrical inspectors needed in Fairbanks. (Tr. 266-67).

24. On or about December 21, 2001, Complainant called Ken Heaps, Kakivik's training manager, to inquire as to his job status. (Tr. 159). No one ever told Complainant that Mr. Heaps had any hiring authority. (Tr. 269, 271). Although Mr. Heaps informed Complainant that he had been selected to work on the pipeline out of Fairbanks, Complainant never received a promise about the Fairbanks job from Kakivik. (Tr. 161, 272-73). On December 27, 2001, Mr. Redmond called Complainant, who was in Louisiana on vacation, to see whether he would be able to return to Alaska on January 3, 2002. (Tr. 162). Complainant was available to start work as early as January 2, 2002, provided that Kakivik agreed to pay for a ticket change, which would cost over a thousand dollars. (Tr. 162-63, 712; CX. 18, p. 1).

25. On or about December 31, 2001, Mr. Redmond again called Complainant, this time to tell him that there was no rush for Complainant to return to work, as Mr. Jordan had been hired during the Christmas holidays. (Tr. 163-64). About a week later, Complainant spoke to Larry Russell, who informed him that his services were no longer needed at that time. Complainant testified that he heard that he was not hired back because he raised too many concerns in the course of his inspections. (Tr. 165). However, Complainant had no personal knowledge of any statements made about his employment by any Alyeska employees to Mr. Redmond, Mr. Casey or Curtis Sipes, the Alyeska project manager for Kakivik. (Tr. 255-56, 495).

26. In December 2001, James Whitaker began working for Kakivik as the site supervisor at the Valdez Marine Terminal. (Tr. 363, 613). He did not recall specifically speaking with Complainant about employment but probably referred Complainant to the office. (Tr. 614). Mr. Whitaker testified that Brett Stewart, the first inspector hired in Valdez, was selected partly due to his qualifications and partly due to the fact that he was already established in town. Mr. Whitaker denied that Mr. Hall had anything to do with this hiring decision, because the client (in this case Alyeska) does not dictate who will work for the contractor (in this case Kakivik). (Tr. 615).

27. During 2002, Mr. Stewart was the only full-time inspector at the Valdez Marine Terminal, and occasionally two Fairbanks inspectors were called in

on short-term projects or filled in when Mr. Stewart was on vacation. (Tr. 305-06). Since the peak manpower had been significantly reduced from the previous year, one electrical inspector was sufficient to cover the ongoing work. (Tr. 382). Mr. Redmond explained that electrical inspectors were selected based upon factors such as need, travel expense and availability. (Tr. 482-83).

28. In early 2002, in an effort to minimize costs, Mr. Luchini told the contractors, including Mr. Whitaker, to mobilize the inspection personnel only on an as-needed basis. (Tr. 357-60, 379).

29. When Complainant learned that Mr. Jordan and Mr. Sanders had been hired as the two electrical inspectors in Fairbanks, he complained to Mr. Heaps, who told him to contact Kakivik's operations manager. (Tr. 279). Complainant never contacted the operations manager because he did not feel comfortable discussing the situation with someone that he did not know. (Tr. 279-82). Complainant preferred to speak with Mr. Sipes. (Tr. 279-82, 495).

30. As early as January 2002, Complainant felt that he was not hired by Kakivik in retaliation for his protected activities as an inspector. (Tr. 188). Complainant did not understand why Mr. Sanders was hired in the middle of January 2002 when Complainant had already told Kakivik that he would be available as soon as possible, even though he was not scheduled to return to Alaska until the end of January 2002. (Tr. 167). Mr. Redmond testified that no travel arrangement changes were made for Mr. Sanders. (Tr. 485). Later, however, Complainant agreed that it was reasonable for Kakivik to hire two qualified inspectors (Mr. Jordan and Mr. Sanders) who were already in Alaska at the time of hire. (Tr. 277-78). It did not occur to Complainant that Kakivik might be scrambling to hire people after being awarded the contract with Alyeska. (Tr. 280-81).

31. In a February 22, 2002 email, Mr. Whitaker was looking for a short-term inspector to fill in for Mr. Stewart while he was on vacation for a week to two weeks. (Tr. 716-17). The email specifically stated that the forty-hour a week job was of limited duration. (Tr. 717). In the email, Mr. Whitaker suggested that Complainant might be willing to do the job and that if Complainant came up to Valdez, he would have the opportunity to gather his personal belongings which had been left there. (Tr. 717-18).

32. For several reasons, Complainant felt that this email was a negative message indicating Kakivik's desire to get rid of him: first, because no one contacted him for the short-term job; second, because "it would be to their

advantage if [Complainant] did get his belongings out of Valdez;" and third, because subsequent emails indicated that another inspector had been requested for the tank project. (Tr. 719).

33. Mr. Sipes testified that Kakivik decided not to hire Complainant for this short-term job because it was not feasible to bring another inspector on for just six days of work. In addition, Kakivik would have had to pay to bring Complainant out to Alaska, without anything else for him to do once Mr. Stewart returned. Ultimately, Kakivik used an existing employee to fill in for Mr. Stewart while he was gone. (Tr. 725).

34. Clifford Moore was the project manager for the Valdez tank project in 2002. As part of his duties, he developed budget figures for the project and gave the contractors a scope of work and an approximate schedule. (Tr. 568-69). Mr. Moore approved Kakivik's bid on the project. (Tr. 569). At that point, it was Kakivik's responsibility to staff the project, and Mr. Moore did not give any direction to Kakivik regarding who should be hired. (Tr. 570). Bob Torbert was in charge of the tank project for Kakivik, and he met with Mr. Moore and the other contractors once a week for a tank coordination meeting. (Tr. 571-72).

35. In early 2002, Mr. Moore expected cathodic protection work on Tank 5 to begin in late April, but delays arose in the meantime that pushed the schedule back. (Tr. 573-75, 579). Mr. Moore communicated this fact to the contractors at a weekly meeting, but apparently Mr. Torbert never relayed this information to Mr. Whitaker. (Tr. 575, 582, 584).

36. From January to April 2002, Complainant continued to contact Kakivik and discuss his return to work with Mr. Sipes. (Tr. 169, 282).

37. Mr. Sipes testified that in early 2002, the workload at Valdez was very slow for the most part. However, the tank project workload was "picking up" at that time. (Tr. 501). Between January 2002 and the time that the tank project was to start, there was not very much electrical inspection work to be done. (Tr. 504).

38. In April 2002, the preliminary work on the Valdez tank project had begun, and Alyeska was in the process of mobilizing the tank processing contractor. (Tr. 374). The tanks had not yet been inspected. (Tr. 375-76). Specifically, in regard to Tank 5, the schedule for inspection of the cathodic protection system had slipped two or three weeks. (Tr. 380).

39. On April 18, 2002, Complainant signed a hire letter/employment contract dated April 12, 2002. (Tr. 261; RX. 6). According to the letter, Complainant was offered a full-time regular employee position as an electrical inspector. (RX. 6). Complainant did not read the contract before he signed it. (Tr. 262). Complainant did not understand that, according to the terms of the contract, he was an at-will employee, nor did he ever raise the issue with any of his superiors at Kakivik. (Tr. 262-64).

40. On April 24, 2002, Mr. Sipes told Complainant to return to Alaska for work on the tank project in Valdez. (Tr. 177, 283). Mr. Sipes never told Complainant that he would be a permanent employee. (Tr. 507).

41. According to Mr. Casey, Complainant came to the Valdez Marine Terminal in April 2002 to be the electrical inspector on the cathodic protection project on one of the tanks. Mr. Whitaker told Mr. Casey that Complainant was to work forty hours a week and was not to work on the weekend. (Tr. 608).

42. Emil Johnson is the electrical inspector coordinator for Alyeska. (Tr. 679). His primary duty is to make checklists to track electrical inspections. (Tr. 683). In April 2002, when Mr. Johnson was working in Valdez, he found nothing out of the ordinary in regard to the electrical inspectors. (Tr. 680, 684). When Complainant returned to Alaska, he stopped by Mr. Johnson's office to talk. (Tr. 684). Although Mr. Johnson did not recall the specifics of the conversation, he acknowledged that he had felt that it was a possibility that he could lose his job due to the reorganization going on at the time. (Tr. 684-85). Mr. Johnson did not recall telling Complainant that he thought people were trying to get rid of him. (Tr. 685).

43. When Complainant arrived at the airport in Valdez on Friday, April 26, he ran into Mr. Whitaker who asked Complainant what he was doing there. At the time, Complainant thought that Mr. Whitaker was joking. (Tr. 178-79, 204-05, 284). Mr. Whitaker testified that he was surprised to see Complainant on Friday because Complainant was not needed for work until Monday. (Tr. 617-18). Mr. Whitaker told Complainant to see Mr. Casey in the morning about his housing and not to go to work until Monday. (Tr. 626-27).

44. Complainant went into the office on Saturday and Sunday, although Mr. Whitaker had told him not to go to the office. (Tr. 180-81, 207-08). Complainant did not recall whether Mr. Sipes or Mr. Casey had told him to report to work on those two days. (Tr. 227-28).

45. Mr. Whitaker had no reason to believe that Complainant was not wanted as an inspector in Valdez. Mr. Whitaker was aware of objections to some of Complainant's practices but was unaware of any objections to his presence on the job. (Tr. 620). In Mr. Whitaker's experience, Complainant had a difficult time letting go of inspection issues once they had been addressed. (Tr. 621-25). Complainant disputed Mr. Whitaker's opinion on this issue. (Tr. 696, 700).

46. As of April 27, 2002, the electrical contractor for the tank project still had not been selected. (Tr. 580, 585-86). Mr. Moore ran into Complainant that day and informed him that the cathodic protection project schedule had slipped at least two weeks. (Tr. 578). Mr. Moore then expressed to Mr. Luchini that he was concerned about having an electrical inspector brought in without any work to do. (Tr. 580).

47. Mr. Luchini affirmed that he had two conversations about Complainant with Mr. Casey. (Tr. 362-63). Mr. Luchini became aware that Kakivik had mobilized some inspection personnel for the tank program, although the schedule for that project had slipped. Because Mr. Luchini wanted to avoid mobilizing inspectors prematurely, he told the Kakivik supervisors that no inspectors were needed at that time. (Tr. 363, 380). Once Mr. Casey understood that the schedule had slipped, he informed Mr. Luchini that he intended to demobilize Complainant. (Tr. 364-66, 380). Mr. Luchini had no reason to believe that Complainant was not a qualified electrical inspector, and he denied telling Mr. Casey to get rid of Complainant because Complainant was a troublemaker. (Tr. 366, 389).

48. Mr. Casey called Mr. Sipes and explained that the schedule on the tank project had slipped and that Complainant was not needed. Mr. Sipes intended to find out whether there was any other work that Complainant could do in the meantime. (Tr. 509). Mr. Casey told Mr. Sipes that there was barely even enough work for Mr. Stewart, the only electrical inspector in Valdez. (Tr. 510). Mr. Sipes also learned that the contractor for the tank project had not yet been selected. (Tr. 511).

49. Complainant worked for about four days, but eventually, Mr. Sipes told Complainant that the project schedule had slipped for an indefinite amount of time and that he was no longer needed. (Tr. 182, 200-01). On April 30, 2002, Mr. Moore told Mr. Hall that the tank program could not afford to keep Complainant on as a full-time electrical inspector and that there was not enough work for Complainant to do. (Tr. 580-81).

50. Also on April 30, 2002, Complainant attended a meeting with Mr. Whitaker, Mr. Sipes and Mr. Casey regarding the lack of work available for him. (Tr. 284-85, 514-15). Kakivik could not afford to keep Complainant on the payroll without an assignment. (Tr. 285-86, 512). When Complainant was laid off on May 1, 2002, he felt that the layoff was a result of his earlier protected activities. (Tr. 191).

51. On May 6, 2002, Complainant spoke with Cindy Wick, the manager of the ECP, alleging that he had been laid off in retaliation for his previous activities. (Tr. 193-94).

52. Kakivik purchased a round-trip ticket for Complainant so that he could return to Alaska if work became available for him. (Tr. 515-17). Mr. Sipes did not recall originally offering Complainant a one-way ticket. (Tr. 563).

53. Complainant returned to Louisiana and continued to call Kakivik in regard to the status of his employment. (Tr. 183-84). When Complainant left Valdez, he was still a regular full-time employee with benefits. (Tr. 455). Nonetheless, Complainant filed for unemployment compensation after he left. (Tr. 456). Complainant was paid for the work he had done before the layoff. Kakivik and Alyeska each paid a portion of the amount owed. (Tr. 517-18).

54. From May to July 2002, Mr. Sipes kept in contact with Mr. Whitaker in the hope of finding some electrical inspection work for Complainant to do, because it was to Kakivik's advantage to have more inspectors on the job. (Tr. 518-19). However, there was not enough work to justify bringing on another electrical inspector in addition to Mr. Stewart, the only electrical inspector in Valdez. (Tr. 519). Although another electrical inspector was brought in from the Fairbanks staff for one short-term project, no other electrical inspectors were hired at Valdez during the remainder of 2002. (Tr. 520, 560-61). According to Mr. Sipes, at times there was hardly enough to do for Mr. Stewart to work a forty-hour week. (Tr. 546).

55. At the time that Complainant was laid off in May 2002, Mr. Kale was working on the tank project for Kakivik. (Tr. 294-97). Mr. Kale worked as a welding inspector on the project from May 2002 through October 13, 2002, when he was laid off. (Tr. 303).

56. According to Mr. Kale, in mid to late June 2002, he had more than one conversation with Mr. Casey in which Mr. Casey stated that Mr. Luchini had told him that he wanted Complainant off the terminal and "wanted [him] to disappear." Mr. Kale testified that Mr. Casey told him that if he

was called to testify, he would say that Mr. Kale was lying. According to Mr. Kale, Mr. Casey was afraid of losing his job and said that he would only testify if Complainant paid him $250,000. (Tr. 297-98). Mr. Kale told Complainant about his conversations with Mr. Casey, but he did not recall the approximate date when he relayed this information. (Tr. 302).

57. Mr. Casey testified that he did have a conversation with Mr. Kale about Complainant, during which Mr. Kale told Mr. Casey that Complainant had called him and that Mr. Kale had told Complainant that he did not want to get involved in his problems and not to call him back. Mr. Casey told Mr. Kale, "[Complainant] is thinking that Jim Luchini had him run off for being a troublemaker. I wouldn't get up and lie for him for a quarter of a million bucks." (Tr. 591, 602). Complainant previously had told Mr. Casey that Mr. Luchini was a hatchet man and that a lot of people would not be working for very long, so Mr. Casey speculated that Complainant blamed Mr. Luchini for his layoff. (Tr. 603).

58. During the time when Mr. Kale and Complainant were having these conversations, Mr. Kale also spoke to Mr. Whitaker about the situation. (Tr. 304). Mr. Whitaker told Mr. Kale to have Complainant call him in regards to the electrical work situation in Valdez. Mr. Kale never relayed this information to Complainant. (Tr. 305).

59. Mr. Kale has a Department of Labor complaint pending against Kakivik. (Tr. 306).

60. On July 5, 2002, Kakivik laid off Complainant for lack of work. (Tr. 458-59; RX. 11). Mr. Redmond, the human resources manager, was unaware of any pressure exerted on Kakivik by Alyeska to not bring Complainant back to work. (Tr. 459). According to Mr. Sipes, there was no other choice but to terminate Complainant. (Tr. 521). Mr. Sipes never heard anyone associated with Alyeska say that they did not want Complainant to work at the Valdez Marine Terminal. (Tr. 522). Mr. Sipes, who was himself a whistleblower at Alyeska in 1995, would not have allowed anyone to force him to get rid of an inspector who was just doing his job. (Tr. 523-26).

61. On August 8, 2002, Complainant mailed a formal complaint to OSHA seeking back pay and benefits retroactive to his January 2002 and May 2002 layoffs. (Tr. 195-96; RX. 1). In his complaint, Complainant noted that he had received his notice of discharge from Kakivik on July 16 or 17, 2002. (RX. 1).

62. In July 2002, Complainant got a job with a company in Louisiana, where he makes about $2500 every other week. (Tr. 184-85, 257). He worked as an electrical inspector from July 2002 through January 2003 and has worked as an emergency shutdown device (ESD) coordinator since February 2003. (Tr. 257). He expects to continue working there indefinitely. (Tr. 258).

63. On November 27, 2002, Complainant gave a statement to OSHA as part of its investigation of his complaint. (RX. 22). Complainant understood that the information that he gave to OSHA in this statement was to be used to determine whether his complaint against Kakivik and Alyeska was valid and affirmed that he told the truth, to the best of his knowledge, in that statement. (Tr. 241-45; RX. 2). In this statement, he blamed his layoff and termination on Mr. Hall, at least partially. Complainant acknowledged that he never mentioned Mr. Luchini in his complainant. (Tr. 245-46). Complainant testified that he withheld information in his OSHA statement to protect other people and that he was withholding information from the Court at the hearing. (Tr. 246-47).

64. Complainant would have earned about $29.50 per hour at Kakivik. While he was in Alaska, Complainant worked about sixty hours a week. (Tr. 185). Complainant estimated that he earned about $80,000 in 2001. He currently earns about $75,000 per year. (Tr. 186).

65. When Complainant worked for the four days in May 2002, he turned in his time sheet to Mr. Casey, a supervisor for Kakivik at the time, and received a paycheck and benefits from Kakivik. Complainant has never received a paycheck or benefits from Alyeska. Alyeska did, however, provide Complainant with housing, the use of a vehicle, safety information and a security badge. (Tr. 201-03).

66. According to a Kakivik work chart, Kakivik hired five electrical inspectors in the 2002 season. In January 2002, Mr. Jordan and Mr. Sanders were each hired to work in Fairbanks, and Mr. Stewart was hired to work in Valdez. In March 2002, Roger Plumb was hired to work in Fairbanks and Valdez, but he quit in April 2002 due to lack of work. In April 2002, Complainant was hired to work in Valdez, but he was laid off in July 2002 due to the slow season. Finally, in August 2002, Mr. Plumb was rehired to work in Fairbanks and Valdez as a temporary employee for the balance of the season. His employment was thereafter terminated as of December 31, 2002. (RX 15).

67. During the time of the hearing in this case, Complainant met the president of Kakivik in the hallway and told him that he did not blame Kakivik. In

fact, Complainant blames Alyeska for directing Kakivik to terminate his employment and blames Kakivik for not fighting the issue. (Tr. 286-87).

LAW AND CONTENTIONS

Jurisdiction

A complainant can assert jurisdiction under all environmental whistleblower statutes in the same proceeding, if the complainant has participated in activities in furtherance of the objections of all the statutes. Jayko v. Ohio EPA, 1999-CAA-5 (ALJ Oct. 2, 2000) (citing Jenkins v. United States EPA, 92-CAA-6 (Sec'y May 18, 1994) and Minnard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1994)).

The various Acts are similar in defining protected activity. The Federal Water Pollution Control Act (WPCA) is designed to "restore and maintain chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Under the WPCA, an employer may not fire or discriminate against any employee if the employee:

1) has filed, instituted, or caused to be filed or instituted, any proceeding covered under this chapter;
2) has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. § 1367(a).

Similar provisions appear in the TSCA, SWDA and CAA. The primary purpose of the TSCA is to assure that "chemical substances and mixtures do not present unreasonable risks of injury to health or the environment." 15 U.S.C. § 2601(b)(3). The SWDA governs whistleblower actions against employers engaged in the treatment, storage, transportation, and disposal of hazardous waste. 42 U.S.C. § 6902(a). The CAA was enacted to create incentives and uniform regulation for pollution control of unregulated pollutants and unregulated sources of air pollution. 42 U.S.C. § 7401(b).

In this case, Respondent Kakivik argues that while Complainant's alleged protected activities are likely implicated under the WPCA and SWDA, there is no evidence that Complainant's activities were related to the matters within the scope of the CAA or the TSCA. In addition, Kakivik cites case law indicating that the TSCA is in effect a "catch-all" statute intended to fill gaps left by other federal environmental whistleblower statutes. Although Complainant alleged violations of all four acts in his original complaint, he presented no evidence to explain why each statute was implicated in his case.

I agree that there is no evidence that any air pollution or toxic substance issues were implicated with regard to Complainant's alleged protected activities in this case. Since Kakivik agrees that the WPCA and SWDA govern the complaint in this case, I find that the WPCA and the SWDA are the applicable statutes. I note, however, that for purposes of analysis, Complainant must fulfill essentially the same statutory requirements in order to succeed on his claim, regardless of which environmental whistleblower statute is applicable.

Timely Filing of Complaint

The WPCA provides in relevant part that "[a]ny employee . . . who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, *within thirty days after such alleged violation occurs,* apply to the Secretary of Labor for a review of such firing or alleged discrimination." 33 U.S.C. § 1367(b) (emphasis added). The Code of Federal Regulations also contains time limits applicable to such complaints, stating that "any complaint shall be filed within thirty days after the occurrence of the alleged violation." 29 C.F.R. § 24.3(b)(1). The thirty-day period begins to run at the time the discriminatory act occurs, not when the employee feels the impact of the discrimination. Chardon v. Fernandez, 454 U.S. 6 (1981). The filing period commences when the employer makes the decision and communicates it or makes it apparent to the employee. Delaware State College v. Ricks, 449 U.S. 250 (1980). The thirty-day statute of limitations has been strictly enforced. However, the principle of equitable tolling applies, and the timeliness of a claim may also be preserved under a continuing violation theory. School District of Allentown v. Marshall, 657 F.2d 16 (3d Cir. 1981); Gore v. CDI Corp. & Carolina Power & Light Co., 91-ERA-14 (Sec'y July 8, 1992).

Respondents in this case argue that Complainant was well aware of the existence of alleged violations of the WPCA and SWDA beginning as early as January 2002, when Complainant felt that he was not hired as an electrical inspector by Kakivik due to his previous whistleblowing activities. Although Complainant signed a hire letter in April 2002, he was ultimately laid off in May 2002 after only four days of work. Respondents argue that both the January 2002 decision not to hire Complainant and the May 2002 decision to lay off Complainant were each adverse and potentially discriminatory actions of which Complainant was aware at the time. Since Complainant did not file his OSHA complaint until August 8, 2002, well over thirty days after either of these alleged violations, Respondents reason that Complainant's claim is time-barred under the WPCA and SWDA.

In support of its argument that the statute of limitations for filing a complaint began running when Complainant was laid off in May 2002, Alyeska submitted the case Johnsen v. Houston Nana, Inc., 1999-TWC-4 (ALJ June 26, 2000), with its brief. In the Johnsen case, this Court granted summary judgment in favor of the respondents after

finding that the statute of limitations for the complainant's claim began running when he was laid off with a notice that he was not eligible for rehire. Johnsen, slip op. at 3. This Court found that the "no rehire" decision constituted "definite notice" and "final and unequivocal notice" under the statute, thereby triggering the thirty-day time limit for filing a whistleblower complaint. Id. at 3-4. The Administrative Review Board (ARB) recently affirmed the Johnsen decision. See Johnsen v. Houston Nana, Inc., 1999-TWC-4 (ARB Feb. 10, 2003).

This case is clearly distinguishable from the situation in Johnsen. Unlike the complainant in Johnsen, Complainant in this case was not given a notice of no rehire when he was laid off in May 2002. Respondents fail to acknowledge that Complainant's actual discharge from Kakivik did not occur until July 5, 2002. Up until that time, Complainant continued to be a Kakivik employee with full benefits, although he was not drawing any salary. Although Complainant felt that his layoff was a retaliatory action, Kakivik's various management employees testified that they hoped to bring Complainant back later in the year if and when more work became available. At the time of the May 2002 layoff, when Complainant left the area, Kakivik even bought Complainant a round-trip ticket back to Alaska. The evidence indicates that Kakivik had not made any final decision as to whether Complainant would be needed at some later point in the year. Indeed, it was only after Kakivik realized that there was simply not enough work to justify hiring another electrical inspector for 2002 that the company terminated Complainant's employment.

I find that Complainant's July 5, 2002 termination was the alleged discriminatory act which initiated the statute of limitations for filing a complaint in this case. According to Complainant's OSHA complaint, he did not receive the July 5, 2002 discharge letter from Kakivik until July 16 or 17, 2002. Although the decision to discharge Complainant technically was made over thirty days before he filed his complaint, this decision was not communicated or made apparent to Complainant until the actual receipt of the discharge letter, which occurred some three weeks before Complainant filed his OSHA complaint. I find that Complainant's claim in this case was timely filed.

Employer/Employee Relationship

Complainant in this case seeks relief against both Kakivik, the company which actually hired and later terminated him, and Alyeska, the company for which Kakivik was contracted to provide inspection services. Alyeska argues that it was not Complainant's employer within the meaning of the environmental acts in question.

Because none of the environmental whistleblower statutes in question define the term "employee," the Secretary of Labor, as affirmed by the United States Court of Appeals for the Sixth Circuit, has determined that the legal standard for determining employee status is the legal test set out by the Supreme Court in Nationwide Mutual Ins.

Co. v. Darden, 503 U.S. 318 (1992). See Reid v. Methodist Medical Center of Oak Ridge, 93-CAA-4 (Sec'y Apr. 3, 1995), aff'd sub nom. Reid v. Secretary of Labor, 106 F.3d 401 (6th Cir. 1996). The inquiry to determine whether a hired party is an employee under the Darden test focuses on the hiring party's right to control the manner and means of production. To that end, certain factors are considered, including whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; whether the work is part of the regular business of the hiring party; the provision of employee benefits; and the tax treatment of the hired party. Darden, 503 U.S. at 323-24 (citing Community for Creative Non Violence v. Reid, 409 U.S. 730, 751-52 (1989)). In this inquiry, no one factor is determinative. Darden, 503 U.S. at 324 (citing NLRB v. United Ins. Co. of America, 390 U.S.254, 258 (1986)).

Based on the facts in this case, evaluated in light of the relevant Darden factors, it is clear that Alyeska was not Complainant's employer for purposes of the environmental acts in question. In December 2001, Complainant applied to work for Kakivik, and in April 2002, Complainant signed a contract to work for Kakivik. Alyeska never hired Complainant to perform inspection work. Rather, Alyeska contracted with Kakivik, who in turn was in control of the hiring process. As per the contract with Alyeska, Kakivik made the assignments for work locations, and Alyeska did not have control over this process. Kakivik also had control over the hiring and laying off process. In addition, Kakivik negotiated wages, hours and benefits and also controlled the discipline process. Kakivik paid employee wages and withholding taxes, while Alyeska reimbursed Kakivik for the wages. Although Alyeska provided Complainant with housing, the use of a vehicle, safety information and a security badge, Alyeska never paid Complainant or provided him with benefits. Although he named Alyeska as a co-respondent in his original complaint, Complainant has presented no evidence to indicate that Alyeska exercised any control over him, his work assignments or his wages while he was employed by Kakivik.

In view of the foregoing, I find that Alyeska was not Complainant's employer within the meaning of the relevant federal environmental whistleblower statutes.

Prima Facie Case/Protected Activity

Section 507(a) of the WPCA provides as follows:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any

> proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. § 1367(a).

Section 507(b) of the WPCA provides that any employee who believes that he has been fired or otherwise discriminated against by any person in violation of the WPCA may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or discrimination. "A copy of the application shall be sent to such person who shall be the respondent." 33 U.S.C. § 1367(b). As noted above, the SWDA contains essentially the same provisions as the WPCA.

The Secretary of Labor has repeatedly articulated the legal framework under which parties litigate in retaliation cases. Under the burdens of persuasion and production in environmental "whistleblower" proceedings, the complainant must first present a prima facie case of retaliation by showing:

1) that the respondent is governed by the WPCA/SWDA;

2) that the complainant engaged in protected activity as defined by the WPCA/SWDA;

3) that the respondent had actual or constructive knowledge of the protected activity and took some adverse action against the complainant; and

4) that an inference is raised that the protected activity of the complainant was the likely reason for the adverse action.

See Hoffman v. Bossert, 94-CAA-4 at 3-4 (Sec'y Sept. 19, 1995); Mackal v. United States Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995); Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor, 992 F.2d 474, 480-81 (3d Cir. 1993); Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995).

In this case, Respondents stipulated that Complainant engaged in protected activities implicated by both the WPCA and the SWDA and that he suffered an adverse action when he was laid off and then terminated. By virtue of his job as an electrical inspector, Complainant was paid to report non-conforming conditions to his employer, such that Complainant's essential function was to be a whistleblower. Complainant contends that because he had written numerous NCRs in the past while working for other contractors, Kakivik, which employed several people who had worked with Complainant in the past, did not want to hire him for the 2002 season. Complainant alleges that he was discriminated against in violation of the WPCA and SWDA when Kakivik failed to hire

him for an electrical inspection job, later brought him on only to lay him off and finally terminated his employment.

The record contains evidence that at least two Kakivik employees were at least potentially aware of Complainant's past engagement in protected activities. Mr. Casey testified that he found Complainant to be a distraction in the workplace when they worked together at AII because Complainant often complained about the situation at Alyeska. Mr. Whitaker testified that Complainant often had difficulty letting go of inspection issues once they had been addressed. Since Kakivik employed several people who were familiar with Complainant in the past, it is reasonable to infer that their knowledge of Complainant's reputation for writing NCRs or his concern for inspection issues could have been a factor in their decision as to whether or not he should be hired for the new contract. I find that Complainant has established a prima facie case of retaliation under the WPCA and SWDA.

The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Lockert v. United States Dep't of Labor, 867 F.2d 513 (9th Cir. 1989). The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. See Yule v. Burns Int'l Security Serv., 93-ERA-12 at 7-8 (Sec'y May 24, 1994). In any event, the complainant bears the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Darty v. Zack Co., 82-ERA-2 at 5-9 (Sec'y Apr. 25, 1983) (citing Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248 (1981)).

Respondents maintain that Complainant's discharge from Kakivik was simply due to a lack of work during the 2002 season. In support of its argument that Complainant's termination was due to a legitimate, nondiscriminatory reason, Kakivik cites the undisputed testimony of Mr. Luchini and Mr. Casey, who both explained that there was less inspection work available in 2002 than there had been in 2001, particularly at the Valdez Marine Terminal. When Kakivik was awarded the contract with Alyeska, there were two weeks until the work was to begin on January 1, 2002. For that reason, Kakivik hired its initial three electrical inspectors primarily on the basis that either they were already working and could be continued in their same employment or they were already in the area and could be brought in with little to no associated travel expense. Complainant, on the other hand, was in Louisiana and was not due back in Alaska until the end of January 2002. Complainant himself testified that a change in his plane ticket was a large expense for Kakivik to pay and agreed that it was reasonable for Kakivik to hire qualified inspectors already in Alaska at the time of hire.

Kakivik points out that its decision to hire Complainant to work on the tank project in April 2002 is indicative of the fact that Kakivik had no discriminatory

intentions toward him. During this time, there was miscommunication between Alyeska and Kakivik about the timeline for the tank project, which had fallen several weeks behind schedule, unbeknownst to several members of Kakivik's management. Mr. Sipes, the project manager who brought Complainant back to Alaska for the tank project, did not realize until after Complainant arrived in Valdez that the project schedule had slipped. At that point, Kakivik realized that there was no enough work for Complainant to do, since there was hardly enough work for the only electrical inspector in Valdez to do. When Complainant was laid off in May 2002, Kakivik purchased him a round-trip ticket and continued to provide him with benefits. Mr. Sipes testified that during this time, he continued to keep in touch with Mr. Whitaker, the site supervisor in Valdez, hoping to find some inspection work for Complainant.

By July 2002, Kakivik determined that it would not be able to bring Complainant back at all, because there was not going to be enough work for the remainder of the year. Kakivik contends that Complainant's termination was essentially an economic decision, not a personal one. Kakivik's records support this contention. According to a Kakivik work chart, after January 2002, only Complainant and one other electrical inspector were hired during the entire year. The other inspector left in April 2002 after one month of work due to lack of work, and Complainant was let go for the same reason shortly thereafter. The other inspector later returned to work for Kakivik, but only as a temporary employee who filled in as needed for the other inspectors.

The evidence in this case overwhelmingly supports the Respondents' position that Complainant was terminated for a legitimate, nondiscriminatory reason—namely, for lack of work. There is little to no evidence to indicate that this legitimate reason was merely pretextual. Instead, the evidence supporting Complainant's position consists largely of his own suspicions and opinions, as well as unsubstantiated rumors which were not corroborated with any supporting testimony. Complainant alleges that Kakivik was motivated by a desire to avoid working with a "troublemaker" when it first failed to hire him in January 2002, laid him off in May 2002 and terminated him in July 2002. Although Complainant alleged that Mr. Johnson warned him that certain people wanted to "get rid of him," Mr. Johnson did not recall telling Complainant such a thing. Mr. Casey testified that he never heard that Complainant was a bad electrical inspector. Mr. Brady, Mr. Redmond and Mr. Sipes all testified that they were unaware of anyone at Alyeska or Kakivik saying that Complainant should not be hired in Fairbanks or Valdez. Mr. Whitaker testified that he had no knowledge of any objections to Complainant's presence on the job. Complainant himself acknowledged that he had no personal knowledge of anyone making such statements about him. Although Mr. Smith, who worked with Complainant at AII, testified that Mr. Hall, Complainant's inspection team lead, once told Mr. Smith that Complainant was not wanted on the job, Mr. Hall testified that he had no complaints about the quality of Complainant's work. Any problems that existed between Mr. Hall and Complainant concerned use of the internet. In fact, everyone who testified as to Complainant's reputation in the workplace agreed that there

were no problems with Complainant's work as an inspector. In addition, Mr. Whitaker testified that Mr. Hall had no control in Kakivik's hiring decisions because he worked for Alyeska.

The only other outside corroboration in support of Complainant's claim was the testimony of Mr. Kale, who testified to two conversations with Mr. Casey in which Mr. Casey allegedly said that Mr. Luchini did not want Complainant working at Valdez. Based on the discrepancies between Mr. Kale's version of events and Mr. Casey's version of events, combined with Mr. Luchini's own testimony, which supports Mr. Casey's version, I accept Mr. Casey's version of events. It is clear that Mr. Luchini told Mr. Casey that Complainant had to be demobilized in April 2002 because the schedule had slipped and there was no work to do. Mr. Luchini denied ever expressing any negative sentiments about Complainant, and there is no indication that Mr. Luchini thought that Complainant was a troublemaker or said anything of the sort to Mr. Casey or anyone else.

Most importantly in this case, Complainant has provided no evidence to refute Kakivik's contention that there was not enough work to justify hiring him in the first place. I found the testimony of Casey, Sipes, Luchini, Moore, Whitaker and Redmond to be credible and persuasive. This testimony and the corroborating evidence convince me that the individuals hired in December 2001 and January 2002 were hired because they were already in place whereas Complainant was in Louisiana. I am also convinced that Complainant's layoff and subsequent termination was due to a lack of work. In failing to show that there actually was work available for which Kakivik hired others after laying off Complainant, Complainant fails to establish that the lack of work was a mere pretext masking Kakivik's retaliatory intent to avoid hiring him.

Accordingly, I find that the preponderance of the evidence establishes that Respondent Kakivik terminated Complainant for reasons unrelated to any activities protected under the WPCA or the SWDA.

RECOMMENDED DECISION AND ORDER

It is the recommendation of the Court to the Secretary of Labor:

That the complaint of Denis Vamvoras be **DENIED**.

A

LARRY W. PRICE
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§